Filed 2/22/19 In re Trayvon C. CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re TRAYVON C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. TRAYVON C., Defendant and Appellant.	D073810 (Super. Ct. No. JCM239962)

APPEAL from an order of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed as modified and remanded with directions.

Ami Sheth Sagel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

Following a contested adjudication hearing, the juvenile court made true findings on a petition filed against Trayvon C. (the Minor) under Welfare and Institutions Code section 602. The court found true one count of assault by means of force likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (a)(4)); battery resulting in serious bodily injury (§ 243, subd. (d)); and simple battery (§ 242).

At the disposition hearing the court found the Minor to be a ward of the court and placed him on probation on various terms and conditions.

The Minor appeals contending the court erred in making a true finding on the simple battery count since that offense is a lesser included offense of battery causing serious bodily injury. He also challenges a probation condition which requires him to report all contacts with law enforcement within three days of such contacts.

We will reject the contention that the simple battery count in this case was only a lesser offense of the battery with injury count. While in the abstract simple battery is a lesser offense of battery with injury, here there were multiple acts of battery committed on the victim, in addition to that which caused injury. Thus, the lesser included offense analysis is inapplicable because the simple battery count is based on separate offenses against the victim. We will agree with the Minor that the challenged probation condition is vague in its failure to distinguish between substantive contacts from those incidental to daily life. We will follow the precedent in *People v. Relkin* (2018) 6 Cal.App.5th 1188 (*Relkin*), and find the condition improper. We will remand the matter to the juvenile

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1 All further statutory references are to the Penal Code unless otherwise specified.

court with directions to either modify the condition consistent with the views expressed in this opinion, or to strike the offending condition.

STATEMENT OF FACTS

The Minor does not challenge either the admissibility or the sufficiency of the evidence to support the true findings. We have reviewed the record and for purposes of this opinion, adopt the respondent's statement of facts as an accurate presentation of the testimony from the adjudication hearing.

At around 2:00 a.m. on January 7, 2017, John V. was working as a security guard greeting people entering Grossmont Hospital's emergency room (ER). The Minor and his brother, whom John referred to in testimony as Stockton, arrived at the ER around 2:15 a.m., where John and other security personnel checked them in and directed them to the front nurse. About five minutes later, the Minor and Stockton left the ER.

Sometime later, an ER tech waved to John and told him there was a problem with the Minor and Stockton in the ambulance bay. John found them in a restricted area not open to the public.

When John told the Minor and Stockton they needed to move away from the restricted area, Stockton said "Fuck you, Nigger. I can be wherever I want to." After John told them again that they could not stay where they were, Stockton threatened John, saying "Homey, don't let me tell you again, I'll fucking smash your jaw."

John used his radio to call for backup and Stockton came at him swinging punches. John was able to deflect the punches and grab Stockton in a bear hug. The

Minor then sucker-punched John twice in the back of the head. On a scale of force from 1 to 10, John rated the first punch a 3 and the second punch a 6.

John did not see the Minor hit him because he was "almost cheek to cheek" with Stockton, but when he pushed back from Stockton and turned, he was facing the Minor. The Minor then backed away and Stockton came after John again, throwing punches. The Minor cheered Stockton on and circled the pair.

Two of Stockton's punches hit John on his chin and cheek. John held Stockton in a bear hug again. And the Minor punched John again in the head, which John rated a force of 3. Then, the Minor grabbed John's arm while Stockton was trying to break out of the bear hug, injuring John's shoulder. John let go of Stockton and stood in between Stockton and the Minor. When the Minor came at John again, John could not move his arm and threw a kick in the Minor's direction instead, but it did not connect with anyone.

Stockton and the Minor came at John again, but the original ER tech and backup security personnel arrived and stopped the altercation. John required surgery for his shoulder injury.

The Minor testified that he was on FaceTime with his girlfriend during the entire incident and his only involvement was to ask his brother and John to stop fighting. The Minor denied hitting John in the head or pulling on his arm. While reviewing video of the altercation on cross-examination, the Minor admitted to being right next to his brother and John during the fight and testified he was showing his girlfriend what was happening on the phone, but did not get involved.

DISCUSSION

The Simple Battery Count

The Minor reasons that simple battery is a lesser offense of battery with injury, a correct proposition. From that premise he argues the simple battery count charged here must be dismissed as an LIO of battery with injury. The problem with this contention is the record reveals there were multiple acts of simple battery, apart from the act causing injury to the victim in this case. As we will point out, those separate acts, not part of the act causing injury were free-standing acts of battery, under section 242, not a lesser offense of the separate offense which caused injury.

A. Legal Principles

In *People v. Aguayo* (2019) 31 Cal.App.5th 758 (*Aguayo*), this court provided a summary of the law regarding multiple convictions arising from the same act or course of conduct. We said:

> " 'In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct.' [Citations.] 'However, a "judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses." ' [Citations.] 'When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed.' [Citations.] 'If neither offense is necessarily included in the other, the defendant may be convicted of both, "even though under section 654 he or she could not be punished for more than one offense arising from the single act or indivisible course of conduct." ' " (*Aguayo, supra,* at p. 762.)

The court in *Aguayo* did not address whether multiple acts committed in the course of conduct could be separately convicted. The principal holding in *Aguayo* was that assault with force likely to cause great bodily injury was not a lesser included offense of assault with a deadly weapon. (*Aguayo, supra,* 31 Cal.App.5th at pp. 724-726.)

People v. Reed (2006) 38 Cal.4th 1224 summarized the issue before us: "In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct." (*Id.* at p. 1226.)

The parties agree in this case that the elements of simple battery are wholly included within the elements of battery with serious bodily injury. The question here is whether there was only one act of battery, or whether there were multiple battery offenses during the same incident.

B. Analysis

The record demonstrates there were at least two separate acts in which force was applied to the victim by the Minor. The first when the Minor struck the victim at least three times in the head to force the victim to let go of the Minor's brother. After the Minor was not successful with the first set of blows he then pulled on the victim's arm to try to break the victim's hold on the Minor's brother. It would appear the pulling on the arm was the source of the injury to the victim's shoulder which occurred because of the incident.

In his argument, the Minor conflates the multiple conviction authority of section 954 with the bar to multiple punishments for the same acts or course of conduct under section 654. The Minor argues that the defendant in *Aguayo, supra,* 31 Cal.App.5th 758,

struck the victim multiple times but was only convicted of two counts. Apparently, he contends that once he struck the victim once, he was entitled to be convicted of only one battery count because it arose from the same incident no matter how many times the victim is struck. He cites no authority for that proposition, and our opinion in *Aguayo* does not support the Minor's argument.

Indeed, there are cases where the prosecution has accumulated multiple offenses into only one or two counts such as in *Aguayo, supra,* 31 Cal.App.5th 758. That does not establish a rule barring multiple convictions of the same type of offense arising from a course of conduct.

Here the juvenile court did not impose any punishment for simple battery because it arose from the same incident, in keeping with the general principle summarized in *People v. Reed, supra,* 38 Cal.4th at page 1226.

In determining whether a person has been convicted of both the greater and lesser offenses we must look to the acts upon which the counts are based. Here there are two separate events in which the Minor willfully applied force to the victim. The fact that each count was a form of battery does not make them the same offense. The court correctly concluded the true findings were justified but did not punish the simple battery count because it arose from the same incident.

C. Probation Condition

The Minor challenges the probation condition which requires him to "report all law enforcement contacts to the Probation Officer within three calendar days." The Minor did not object in the juvenile court, but contends the condition is unconstitutionally

vague, thus his failure to object does not cause forfeiture of the issue on appeal. The People contend that even if the issue is not forfeited the condition is not impermissibly vague.

Ordinarily, a defendant must object to a probation condition in the trial court in order to preserve the challenge for appellate review. (*People v. Welch* (1993) 5 Cal.4th 228, 234.) Where a condition is unconstitutionally vague or overbroad an objection may be raised for the first time on appeal. In such instances the defect can be discerned from the language of the condition and does not require resort to the facts in the record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 882 (*Sheena K.*).)

In order for a probation condition which limits otherwise lawful activity to be valid, the probationer must be able to know what is expected or prohibited. In *Sheena K.*, the juvenile was ordered not to associate with persons who are disapproved by the probation officer. The court found the condition to be vague and overbroad. The condition did not have a knowledge or scienter requirement; thus, the juvenile would not know who to avoid. (*Sheena K.*, *supra,* 40 Cal.4th at p. 890.)

In *Relkin, supra,* 6 Cal.App.5th 1188, 1196-1198, the court dealt with a condition which required the defendant to report, among other things, any contact with any peace officer. The defendant contended that such requirement was vague. The court agreed stating: ". . . the portion of the condition requiring that defendant report 'any contact with . . . any peace officer' is vague and overbroad and does indeed leave one to guess what sorts of events and interactions qualify as reportable." (*Id.* at p. 1197.)

The People urge us not to follow *Relkin, supra*, 6 Cal.App.5th 1188 because the condition would not require the Minor to report casual or insignificant contacts. The problem with that position, which was rejected in *Relkin*, is that the condition clearly requires reporting of all contacts with all law enforcement officers and does not provide any guidance that would allow selectivity among types of contacts (as was the case in similar conditions this court has upheld against vagueness challenges).

We agree with the court in *Relkin, supra*, 6 Cal.App.5th 1188 that such condition must be modified to give the Minor notice as to which types of contacts with law enforcement he is required, under pain of probation revocation, to report. Accordingly, we will remand the matter to the juvenile court to either clarify the scope of the condition or to strike it.

DISPOSITION

The case is remanded with directions to modify or strike the condition of probation which requires the Minor to report law enforcement contacts consistent with the views expressed in this opinion. In all other respects the adjudication and disposition orders are affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

GUERRERO, J.